Supreme Court, U.S.
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No. 99-1199

IN THE

Supreme Court of the United States

October Term, 1999

RANDEL T. READ,

Petitioner,

-against-

NEW YORK STATE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counter Statement of Question Presented

Does the United States Constitution require police and prosecutors to sua sponte deliver all documents in their possession to defense counsel prior to the trial of a criminal case.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Brief in Opposition to Petition for a Writ of Certiorari
Counter Statement of the Case

On June 6, 1994, Petitioner was Indicted by a New York State Grand Jury for the crime of Robbery in the Third Degree in violation of New York Penal Law sec. 160.05 which provides: "A person is guilty of Robbery in the third degree when he forcibly steals property." The Bill of Particulars specified that the crime was committed on June 4, 1994 at approximately 6:45 A.M. at the Acropolis Diner on Main Street in Poughkeepsie.

The trial commenced on November 15, 1994 and jury selection was completed that day. On the morning of November 16th, before opening statements were given, the prosecutor gratuitously turned over to defense counsel a copy of the Town of Poughkeepsie police blotter from the morning of June 4, 1994. It listed the complainant as Marie Grant and also listed her address and telephone number and the following account:

> REPORTS FILE 8 STRONG ARM JUST OCCURRED AT ACROPOLIS DINER, 849 MAIN STREET, SUSPECT DESC AS YOUNG W/M PURPLE SWEATSHIRT, RED AND WHITE BELT. COMPLAINANT DID NOT SEE FURTHER AND THE VICTIM IS CHASING THE SUSPECT AT THIS TIME.

(Petitioner's Exhibit 1)

On the People's direct case, the prosecutor called a man who had driven Petitioner to the diner, the victim, George Roussos, and two police officers. The victim Roussos was working at the diner. While he was sitting at the counter, Petitioner approached him and asked for change of a $100.00 bill. (T35-36) Petitioner followed Roussos to the cash register and when Roussos opened the drawer, (T36) Petitioner pushed him in the chest. (T56, T71) Roussos grabbed Petitioner's hair and called for help. (T59-60, T76) Petitioner pushed and released himself from Roussos grip. Then he took $70.00 from the register and ran out the door. (T36-37, T41) Roussos followed him and eventually caught him, obtained the stolen money and returned Petitioner to the diner where the police were waiting. (T37-38, T40)

Roussos testified that at the time of this incident there were two customers in the diner who were sitting at the counter and four or five employees. He did not see any customers sitting in the booths. (T50-51, T72)

Roussos, who could not read or write English well and could only understand fifteen to twenty percent of the English language, (T52-53) acknowledged that in the written statement he gave the police, he stated: "When I opened the cash register drawer, he reached over the counter and pushed me in the chest with his arm. At this point, I grabbed him by the head and tried to push him away." (T81-82) Roussos was cross examined with his Grand Jury testimony. GJ12, GJ15, T74)

The People's case was completed in one day. The Defense called no witnesses and the Court denied the Petitioner's motion to dismiss on the ground that the prosecution had not established his guilt beyond a reasonable doubt. (T137-39) The Court then gave the attorneys the option of delivering their summations that afternoon or the following morning. Petitioner's attorney advised the Court that he wanted to present his closing argument that day. Summations were given and the trial was adjourned until the following morning. (T 171-72, T228-30)

The next morning when the Court was prepared to charge the jury, defense counsel moved to re-open his case. For the first time, he advised the Court that a week earlier the defense investigator had learned from the Town of Poughkeepsie Police that Marie Grant had witnessed the crime. The police had told him that they did not have her phone number. The defense investigator had telephoned every "Grant" listed in the phone directory but had not located Marie Grant. When the prosecutor had turned over the blotter the preceding day, it contained Mrs. Grant's address and phone number. Although the defense investigator had spent all day on November 16th trying to contact Mrs. Grant, he had not been able to reach her until 8:20 A.M. on November 17th. Defense counsel advised the Court that contrary to Roussos testimony, she had been sitting in a booth at the diner. After she heard a loud bang, she had looked and had seen Petitioner with his hand in the register, almost hugging the register which appeared to move almost off the counter. (T226) She had also told the defense that she did not see the Petitioner push the clerk or use any force against him. (T225) The Court denied the Petitioner's motion to reopen reminding counsel that he had elected to deliver his summation the preceding day and had never mentioned that he was still trying to locate any possible witness. (T228-30)

After the jury returned with a verdict of guilty, defense counsel moved to set aside the verdict. He submitted an affidavit from Marie Grant who reported that she had been sitting in a booth across from the cash register with her son. After hearing a loud noise, she looked up at the cash register and observed a man standing near the register with his left hand in it. The diner cashier had the man by the sleeve. The man pulled away from the cashier and ran out the door. She stated that she did not see the man push the cashier or use force against him. Darin Grant also submitted an affidavit in which he reported having been seated in a booth with his mother; after hearing a noise, he looked up and saw a man with his left hand in the cash register. The cashier was holding the man's left arm, but the man was able to pull away and run out the door. Darin Grant also stated that he did not see the younger man use force or push the cashier.

The trial judge denied the motion.

REASONS FOR DENYING THE WRIT

The respondent contends that Petitioner's argument is without merit because there was no Brady violation and there is no support for a perjury claim here. Moreover, the United States Court of Appeals for the Second Circuit fully considered and correctly decided the issues. Finally, since this court recently revisited the issue of disclosure of exculpatory material, the issues presented here are controlled by this Court's prior decisions and this case does not warrant further review.

Petitioner first complains that the failure to turn over the police blotter when Petitioner first made his pre-trial demand for Brady material was error. However, this argument mischaracterizes what constitutes Brady material. Petitioner was accused of robbery -- forcibly taking property. New York Penal Law sec. 160.00 defines Robbery as:

> Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the use of physical force upon another person for the purpose of:
>
> 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

New York Courts have found that a robbery is committed when a person pulls a bag from the victim's hand. See People v. Ross, 180 A.D.2d 698, 579 N.Y.S.2d 713 (2d Dept.), appeal denied, 79 N.Y.2d 1053, 596 N.E.2d 419, 584 N.Y.S.2d 1021 (1992). Accord People v. Crandall, 135 A.D.2d 1084, 523 N.Y.S.2d 304 (4th Dept. 1987). Also, in People v. Safon, 166 A.D.2d 892, 560 N.Y.S.2d 552 (4th Dept.), appeal denied 76 N.Y.2d 990, 565 N.E.2d 528, 563 N.Y.S.2d 779 (1990), the Court found sufficient evidence to support a forcible taking where the store clerk grabbed the hand in which the defendant was holding the money and the two tugged at each other until the defendant's hand slipped from the glove. Here the entry in the police blotter at issue concerns a "strongarm." The use of that term refers to a forcible taking. Therefore, the blotter entry itself does not tend to exculpate Petitioner.

Next, it must be remembered that the name "Marie Grant" was known to Petitioner a week before the trial and the blotter entry itself was turned over on the morning of November 16th. Petitioner's counsel elected to deliver his closing remarks later that afternoon without telling the court that the defense was still looking for a witness. In any event, the affidavits of Marie and Darin Grant which were submitted on the defendant's motion to set aside the verdict support the finding of a forcible taking. Marie Grant said that the

cashier had the thief by the sleeve and the man pulled away from the cashier and ran out the door. Darin Grant observed the man's left hand in the cash register and the cashier holding the man by his left arm. The man pulled away and ran out the door. The mere fact that both stated they did not see the Petitioner use force is immaterial when the facts they described constituted the use of force as defined by New York law. As a result, the blotter entry and the account of both Grant's do not constitute exculpatory evidence. Moreover this information does not become "Brady" material merely because Petitioner characterizes it as such.

It is well settled that the prosecution is not required to open its files to criminal defendants. Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972).

In any event, this Court has ruled that Brady only requires disclosure of exculpatory information which, if suppressed, would deprive the Petitioner of a fair trial. United States v. Bagley, 473 U.S. 667, 675, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1995). Here the Second Circuit correctly concluded that Marie and Darin Grant's observations of the defendant pulling away from the cashier would not have changed the verdict and the failure to disclose the blotter entry until the morning the People began to present their direct case could not have deprived Petitioner of a fair trial. Since the Second Circuit's ruling constitutes a correct application of the Brady rules outlined last June by this Court in Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286, 301 (1999), the issues which Petitioner seeks to raise here do not merit further review by this Court.

In the second argument Petitioner makes, he attempts to argue that the victim, George Roussos lied. However, there is no support for this claim on this record. Specifically, there is no indication that Roussos, who was sitting at the counter before he was approached by Petitioner even knew that there was anyone in the booth. The fact that Petitioner refers to what he now characterizes as conflicting accounts given by Roussos is rather misleading. The Respondent

submits that the statements cited by Petitioner, when considered as a whole, are consistent. The victim was an immigrant with limited command of the English language. Any variations in his wording were for the jury to consider on the issue of credibility but do not render him guilty of intentionally lying. Moreover, it was for the jury which heard and saw the witness, rather than for this Court, to evaluate his credibility.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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